Syarizan bin Sudirmin (a child claimed through the father and his attorney Sudirmin bin Selamat) & Ors v Abdul Rahman bin Bukit & Anor

HIGH COURT (IPOH) — CIVIL SUIT NO 22–119 OF 2001
VT SINGHAM J
29 DECEMBER 2009

Civil Procedure — Damages — Exemplary damages — Unauthorised, willful, wrongful and oppressive conduct — Whether exemplary damages ought to be awarded to indicate court's disapproval of such conduct

Damages (Personal injuries or death) — General damages — Pain, suffering and loss of amenities — Nursing care, assessment of — Maid and/or nurse unwilling to provide care required by paraplegic victim — Whether victim's father who gave up job to care for victim ought to be compensated for value of services rendered

Damages (Personal injuries or death) — Quantum — Head injuries

Damages (Personal injuries or death) — Quantum — Paraplegia with multiple injuries

Tort — Damages — Exemplary damages — Unauthorised, willful, wrongful and oppressive conduct — Whether exemplary damages ought to be awarded to indicate court's disapproval of such conduct

Tort — Negligence — Contributory negligence — Motorcyclist badly injured in course of police chase — Motorcyclist not wearing crash helmet and speeding — Motorcyclist brought down by policeman's kick to motorcycle — Whether motorcyclist contributed to injuries and damage sustained — Whether doctrine of 'ex turpi cause non oritur actio' applicable — Whether recoverable damages ought to be reduced proportionately having regard to motorcyclist's blameworthiness

Tort — Negligence — Duty of care — Police — Whether policeman owes a duty of care to suspect being pursued — Nature and extent of duty

The first plaintiff was riding a motorcycle with the second plaintiff as pillion when he noticed a group of policemen conducting a traffic inspection in the

A distance. At the material time, both the first and second plaintiffs were 15 years old. The first plaintiff was not licensed to ride a motorcycle. Neither he nor the second plaintiff was wearing a crash helmet. The first plaintiff made a 'U' turn and sped away in an attempt to escape the policemen. The first defendant — a policeman in the group — got on to his motorcycle and B chased after the speeding first plaintiff. When the first defendant drew alongside the first plaintiff, he kicked at the first plaintiff's motorcycle causing the first plaintiff to lose control and crash. Both the first and second defendants sustained serious injuries. The first plaintiff was rendered a paraplegic and became wheel-chair bound. The first plaintiff claimed that C after the crash, the first defendant severely assaulted and stabbed him as he lay on the road. The plaintiffs claimed for general and special damages against the defendants. The first plaintiff further claimed for exemplary and aggravated damages.

D **Held**, allowing the claims substantially:

(1) Both the plaintiffs were truthful witnesses. The High Court would accept their version of the incident as to how the first defendant had kicked at their motorcycle causing the first plaintiff to lose control and fall. The first defendant was negligent and the court would reject his E account that the plaintiffs fell off their machine because the first plaintiff was speeding and had lost control of his machine. The plaintiffs had established on a balance of probabilities, that the first defendant had kicked the first plaintiff's motorcycle thereby causing the first plaintiff to lose control of his machine, resulting in both the F plaintiffs falling onto the road (see paras 14 & 16).

(2) A policeman in pursuit owes a duty of care to the suspect he is pursuing. The standard of care on a policeman in such a situation is to exercise such care and skill as is reasonable in all the circumstances. In the G instant case, the act of the first defendant in kicking at the speeding first plaintiff's motorcycle, notwithstanding the first plaintiff's attempt to escape the police traffic inspection, was unjustified and unlawful (see para 17). *Marshall v Osmond & Anor* [1983] 2 All ER 225 referred.

H (3) In speeding to escape arrest in the police pursuit, the first plaintiff posed a serious risk to himself and to other road users. He had contributed to the damage suffered and damages had thus to be reduced having regard to his share in the responsibility for the damage. As for not wearing a crash helmet, a reasonable prudent motorist in the position of the first I plaintiff would have foreseen that the wearing of a crash helmet would result in less harm or injury in the event of a collision. Thus, there ought to be a deduction in the damages awarded for the first plaintiff's head injury (see paras 18–19).

(4) Having regard to the totality of the evidence, the first plaintiff had failed to establish on a balance of probabilities that the first defendant had assaulted and stabbed him after he had fallen and when he was lying on the road (see para 20).

(5) Exemplary, aggravated, or vindictive damages may be awarded whenever it is found that the defendant's conduct is sufficiently outrageous, willful and unlawful to merit such punishment. In the instant case, the court would not award aggravated damages in connection with alleged assault since the court was not satisfied that the first plaintiff was assaulted, beaten and stabbed after he fell as alleged (see para 21).

(6) However, the first plaintiff was entitled to exemplary damages in addition to compensatory damages in connection with the first defendant's act of kicking the motorcycle. The first defendant's act of kicking the first plaintiff's motorcycle to prevent him from escaping for a mere breach of traffic regulations was unjustified, unacceptable and unlawful under the circumstances. It was an unauthorised, willful, wrongful and oppressive act. The award of exemplary damages was thus to mark the court's disapproval of the first defendant's unwarranted, willful, oppressive and wrongful conduct and to deter him from repeating it. On the facts, a sum of RM50,000 was reasonable as exemplary damages (see paras 22–23). *Rookes v Barnard* [1964] 1 All ER 367 referred; *Loudon v Ryder* [1953] 1 All ER 741 referred.

(7) The act of the first defendant was committed in the course of his employment. The second defendant was thus vicariously liable for the negligent act of the first defendant (see para 25). *Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor* [2008] 3 MLJ 81 (referred); *Maslinda bt Ishak v Mohd Tahir bin Osman & Ors* [2009] 6 MLJ 826 referred.

(8) In the instant case, the blameworthiness of the first defendant was higher than that of the first plaintiff. Accordingly, liability should be apportioned at 75% against the first defendant and 25% contributory on the part of the first plaintiff for his want of reasonable care for his own safety and failure to wear a crash helmet that had contributed to his head injuries. The doctrine of 'ex turpi cause non oritur actio' did not apply to the facts and circumstances of the instant case (see para 26). *Vijayan a/l Kunju Kunju v Yunos bin Dollah & Anor* [1993] MLJU 12; [1993] 3 CLJ 677 referred.

(9) Not all maids would be willing to provide the services required by the first plaintiff. The first plaintiff's father had given up his job as a fisherman to look after the first plaintiff, and had to be compensated fairly and justly for the value of the services rendered. It must be the same as if a domestic help was engaged to look after the first plaintiff. A sum of RM500 per month was a reasonable amount (see para 30). *Taylor v Bristol Omnibus Co Ltd & Anor* [1975] 2 All ER 1107 (referred); *Marappan & Anor v Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99 referred.

(10) Since the first plaintiff's father had given up his job as a fisherman and had spent time with the first plaintiff in the hospital during the 66 months, it was reasonable to compensate him for this, notwithstanding the hospital authorities were there to look after him. A sum of RM200 per month for the 66 months was a reasonable amount under the circumstances (see paras 31–32).

(11) For the second plaintiff, a sum of RM5,000 ought to be awarded on full liability as general damages. After a 15% deduction for not a wearing crash helmet which caused her facial injuries, general damages was reduced to RM4,250 (see para 34).

[Bahasa Malaysia summary

Plaintif pertama sedang menunggang motosikal bersama plaintif kedua sebagai pembonceng apabila dia menyedari sekumpulan polis menjalankan pemeriksaan lalu lintas dari jarak jauh. Pada masa matan, kedua-dua plaintif pertama dan kedua berumur 15 tahun. Plaintif pertama tidak mempunyai lesen menunggang motosikal. Dia mahupun plaintif kedua memakai topi keledar. Plaintif pertama telah membuat pusingan 'U' dan memecut untuk cuba melarikan diri daripada polis. Defendan pertama — seorang polis dalam kumpulan itu — telah menaiki motosikalnya dan mengejar plaintif pertama yang memecut itu. Apabila defendan pertama hampir bersebelahan plaintif pertama, dia telah menyepak motosikal plaintif pertama hingga menyebabkan plaintif pertama hilang kawalan dan jatuh. Kedua-dua defendan pertama dan kedua telah mengalami kecederaan serius. Plaintif pertama menjadi paraplegik dan terpaksa hidup atas kerusi roda. Plaintif pertama mendakwa bahawa selepas jatuh, defendan pertama telah menyerangnya dengan teruk dan menikamnya semasa dia terbaring di atas jalan. Plaintif-plaintif menuntut ganti rugi am dan khas terhadap defendan-defendan. Plaintif pertama selanjutnya menuntut ganti rugi teladan dan tambahan.

Diputuskan, membenarkan tuntutan-tuntutan tersebut:

(1) Kedua-dua plaintif merupakan saksi-saksi yang jujur. Mahkamah Tinggi akan menerima versi mereka tentang kejadian bagaimana

defendan pertama telah menyepak motosikal mereka hingga menyebabkan plaintif pertama hilang kawalan dan jatuh. Defendan pertama telah cuai dan mahkamah akan menolak keterangannya bahawa plaintif-plaintif telah jatuh daripada motosikal mereka kerana plaintif pertama memecut dan telah hilang kawalan terhadap motosikalnya. Plaintif-plaintif telah membuktikan atas imbangan kebarangkalian, bahawa defendan pertama telah menyepak motosikal plaintif pertama hingga menyebabkan plaintif pertama hilang kawalan motosikalnya, yang mengakibatkan kedua-dua plaintif jatuh ke atas jalan (lihat perenggan 14 & 16).

(2) Seorang polis yang sedang mengejar mempunyai kewajipan terhadap suspek yang dikejarnya. Piawai berhati-hati ke atas polis dalam keadaan sedemikian adalah untuk menggunakan sikap berhati-hati dan kemahiran yang sewajarnya dalam semua keadaan. Dalam kes ini, tindakan defendan pertama yang menyepak motosikal plaintif pertama, meskipun percubaan plaintif pertama untuk melarikan diri daripada pemeriksaan polis lalu lintas, tidak dijustifikasikan dan menyalahi undang-undang (lihat perenggan 17); *Marshall v Osmond & Anor* [1983] 2 All ER 225 dirujuk.

(3) Dengan memecut untuk melarikan diri daripada ditangkap polis yang mengejar, plaintif pertama telah meletakkan dirinya dan pengguna jalan lain dalam keadaan berisiko tinggi. Dia telah menyumbang kepada kecederaan yang dialami dan ganti rugi hendaklah dikurangkan dengan mengambilkira sumbangannya kerana tanggungjawab terhadap kecederaan itu. Berhubung topi keledar yang tidak dipakai itu, pemandu yang waras dan berhati-hati dalam kedudukan plaintif pertama sepatutnya dapat meramalkan bahawa pemakaian topi keledar dapat mengurangkan bahaya atau kecederaan sekiranya berlaku pelanggaran. Oleh itu, memang patut ada potongan dalam ganti rugi yang telah diawardkan untuk kecederaan kepala plaintif pertama (lihat perenggan 18–19).

(4) Setelah mengambilkira keseluruhan keterangan, plaintif pertama telah gagal untuk membuktikan atas imbangan kebarangkalian bahawa defendan pertama telah menyerang dan menikamnya selepas dia jatuh dan semasa dia terbaring di atas jalan (lihat perenggan 20).

(5) Ganti rugi teladan, teruk, atau pendendam boleh diawardkan apabila didapati perbuatan defendan amat melampau, dengan sengaja dan menyalahi undang-undang untuk mewajarkan hukuman sedemikian. Dalam kes ini, mahkamah tidak akan memberikan award untuk ganti rugi teruk berkaitan dengan serangan yang dikatakan memandangkan mahkamah tidak berpuas hati bahawa plaintif pertama telah diserang, dipukul dan ditikam selepas dia jatuh seperti yang dikatakan (lihat perenggan 21).

(6) Walau bagaimanapun, plaintif pertama berhak kepada ganti rugi teladan sebagai tambahan kepada ganti rugi pampasan berkaitan tindakan defendan pertama menyepak motosikal itu. Tindakan defendan pertama menyepak motosikal plaintif pertama untuk menghalangnya daripada melarikan diri daripada melanggar peraturan lalu lintas tidak dijustifikasikan, tidak boleh diterima dan menyalahi undang-undang di dalam keadaan tersebut. Ianya tindakan tanpa kebenaran, dengan sengaja, salah dan menindas. Award untuk ganti rugi teladan dengan itu menandakan sikap mahkamah yang tidak bersetuju dengan perbuatan defendan pertama yang tidak wajar, sengaja, menindas dan salah dan untuk menghalangnya daripada mengulanginya. Berdasarkan fakta, sejumlah RM50,000 merupakan ganti rugi teladan yang wajar (lihat perenggan 22–23); *Rookes v Barnard* [1964] 1 All ER 367 dan *Loudon v Ryder* [1953] 1 All ER 741 dirujuk.

(7) Tindakan defendan pertama telah dilakukan dalam tempoh pekerjaannya. Defendan kedua dengan itu bertanggungjawab secara vikarius kerana tindakan cuai defendan pertama (lihat perenggan 25). *Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor* [2008] 3 MLJ 81 dirujuk; *Maslinda bt Ishak v Mohd Tahir bin Osman & Ors* [2009] 6 MLJ 826; dirujuk.

(8) Dalam kes ini, kelakuan defendan pertama yang patut dipersalahkan lebih tinggi daripada plaintif pertama. Sewajarnya, liabiliti hendaklah dibahagikan 75% terhadap defendan pertama dan 25% di pihak plaintif pertama kerana dia sewajarnya patut berhati-hati demi keselamatan dirinya dan kegagalan untuk memakai topi keledar yang telah menyumbang kepada kecederaan di kepalanya. Doktrin ex turpi cause non oritur actio tidak terpakai kepada fakta dan keadaan kes ini (lihat perenggan 26); *Vijayan a/l Kunju Kunju v Yunos bin Dollah & Anor* [1993] MLJU 12; [1993] 3 CLJ 677 dirujuk.

(9) Tidak semua pembantu sanggup memberikan khidmat yang diperlukan oleh plaintif pertama. Bapa plaintif pertama telah berhenti bekerja sebagai nelayan untuk menjaga plaintif pertama, dan hendaklah diberi pampasan dengan adil dan sewajarnya untuk nilai khidmat yang diberikan. Ia perlu sama seperti pembantu rumah yang diupah untuk menjaga plaintif pertama. Sejumlah RM500 sebulan adalah jumlah yang munasabah (lihat perenggan 30); *Taylor v Bristol Omnibus Co Ltd & Anor* [1975] 2 All ER 1107 dan *Marappan & Anor v Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99 dirujuk.

(10) Oleh sebab bapa plaintif pertama telah sanggup berhenti kerja sebagai nelayan dan meluangkan masa dengan plaintif pertama di hospital sepanjang 66 bulan, adalah wajar untuk memberi pampasan kepadanya untuk ini, meskipun pihak berkuasa hospital berada di situ untuk

menjaganya. Sejumlah RM200 sebulan selama 66 bulan itu adalah jumlah yang wajar dalam keadaan tersebut (lihat perenggan 31–32).

(11)Untuk plaintif kedua, sejumlah RM5,000 patut diawardkan atas liabiliti penuh sebagai ganti rugi am. Setelah potongan 15% kerana tidak memakai topi keledar yang menyebabkan kecederaan pada mukanya, ganti rugi am telah dikurangkan kepada RM4,250 (lihat perenggan 34).]

Notes

For a case on head injuries, see 6 *Mallal's Digest* (4th Ed, 2009 Reissue) para 1256.

For cases on contributory negligence, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 880–931.

For cases on exemplary damages, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2283–2286.

For cases on exemplary damages in tort, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 198–201.

For cases on general damages in general, see 6 *Mallal's Digest* (4th Ed, 2009 Reissue) paras 547–550.

For cases on quantum in general, see 6 *Mallal's Digest* (4th Ed, 2009 Reissue) paras 951–1983.

Cases referred to

Loudon v Ryder [1953] 1 All ER 741, CA (refd)

Marappan & Anor v Siti Rahmah bte Ibrahim [1990] 1 MLJ 99, SC (folld)

Marshall v Osmond & Anor [1983] 2 All ER 225, CA (folld)

Maslinda bt Ishak v Mohd Tahir bin Osman & Ors [2009] 6 MLJ 826; [2009] 6 CLJ 653, CA (refd)

Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor [2008] 3 MLJ 81, CA (refd)

Morey v Woodfield [1963] 3 All ER 533, CA (refd)

Rookes v Barnard [1964] 1 All ER 367, HL (folld)

Taylor v Bristol Omnibus Co Ltd & Anor [1975] 2 All ER 1107, CA (folld)

Vijayan a/l Kunju Kunju v Yunos bin Dollah & Anor [1993] MLJU 12; [1993] 3 CLJ 677, HC (folld)

Legislation referred to

Civil Law Act 1956 ss 12(1), 28A(2)(d)(i)

Government Proceedings Act 1956 ss 5, 6, 6(1)

Motor-Cycles (Safety Helmets) Rules 1973 r 4

Penal Code s 338

Rules of the High Court 1980 O 42 r 12

Ngeh Koo Ham (Kartini bt Mansor with him) (Ngeh & Co) for the plaintiffs.
Abdul Roni bin Abdul Rahman (Abdul Roni & Co) for the first defendant.

Amarjit Singh (Senior Federal Counsel, Attorney General's Chambers) for the second defendant.

VT Singham J:

[1] The plaintiffs' claim against the police Lans Corporal, Abdul Rahman bin Bukit (the first defendant) and the Government of Malaysia, the second defendant is for damages, both the general and special damages under the Law of Tort. The claim for damages, arose out of serious injuries and loss suffered by the plaintiffs as a result of a tortious act committed by the first defendant on 9 September 1999 at about 9.15pm at Jalan Besar Pasir Bogak, Pangkor, an employee of the second defendant, the Government of Malaysia.

FACTS

[2] On 9 September 1999 at about 9pm at along Jalan Pasir Bogak, Pangkor, the first plaintiff, Syarizan bin Sudirmin, age 15 years (at the time) was riding a motorcycle No ADE 4283 with the second plaintiff, Zuraidah bt Umar, aged 15 years (at the time) was a pillion. On seeing a group of policemen at a distance ahead of him, the first plaintiff who was travelling towards Teluk Nipah made a 'U' turn and proceeded towards Pangkor town in an attempt to escape from the police as he was not wearing a crash helmet and had no license to ride a motorcycle. The third plaintiff, Sani bin Ahmad claimed to be the registered owner of the motorcycle ADE 4283 which the first plaintiff was riding. The third plaintiff's claim is for damages for cost of repairs to his motorcycle which was damaged. The first defendant, a police constable was riding motorcycle No BEU 187 at the time of the actual incident.

[3] The first plaintiff had testified that, while he was riding the motorcycle No ADE 4283 with the second plaintiff as his pillion towards the Pangkor town after having made a 'U' turn to escape the police for traffic offences, namely, for not wearing crash helmet and not having license to ride a motorcycle, the first defendant who chased him on motorcycle No BEU 187 from the rear, came abreast with him and kicked his m/cycle and both the plaintiffs fell with the motorcycle. As a result they have suffered serious injuries and loss (Note: the first defendant also fell but he got up).

[4] The first plaintiff suffered serious injuries and he is now a paraplegia and is a wheel chair dependant and he will be the same for the rest of his life (see medical report dated 23 March 2000 from Hospital Sri Majong, medical report dated 12 September 2000 from Hospital Ipoh, medical report dated 18 December 2000 from Hospital Ipoh, specialist report dated 26 December 2000 ('P14') by Dr Abd Shukor Mohd Hashim of Institute of Orthopedic

and Traumatology Hospital Kuala lumpur, specialist report dated 9 February 2001 ('P15') by Dr Abd Shukor Mohd Hashim, medical report dated 22 June 2001 from Hospital Kuala Lumpur, medical report dated 22 March 2004 by Dr Abd Shukor bin Hashim ('P16'), specialist report dated 25 August 2007 by Dr Abd Shukor bin Hashim). The first plaintiff was readmitted to Hospital Kuala Lumpur on 13 May 2005–31 May 2005 where he underwent a further surgery on his buttocks for bed sore as his skin become rotten. He cannot sit for long time and has to lift his buttocks. *While he was giving evidence in court*, he was sitted on the wheel chair and he had to lift his buttocks very often and had to pause before he continued with his evidence. The first plaintiff said he had his crash helmet with him but he did not wear it.

[5] The first plaintiff has further claimed *exemplary* and *aggravated damages*. He has alleged that he was severely beaten, assaulted and stabbed by the first defendant after he had fallen down from the motorcycle and was lying on the road after the first defendant had kicked his motorcycle.

[6] The second plaintiff ('pillion rider'), Zuraidah bt Omar, had also testified that the first defendant had kicked their motorcycle, the first time he kicked, it hit her right leg (paha), the second time the first defendant kicked, it hit the right rear side of the motorcycle. The first plaintiff (rider) then lost control of the motorcycle and they were both thrown off the motorcycle onto the road. She then became unconscious. Her evidence is supported by her police report (exh P18). The second plaintiff suffered injuries as per the medical report dated 27 September 1999 from Klinik Kesihatan Pangkor.

[7] The evidence of both the first and second plaintiff is consistent and is supported by the second plaintiff's police report that the first defendant had kicked the motorcycle they were riding which caused them to fall and suffer injuries.

[8] *Whereas the first defendant's defence* is that, the first plaintiff lost control of the motorcycle as he was riding at a fast speed in an attempt to escape the police. He had seen from a distance that the first plaintiff was not wearing a crash helmet. Therefore, it was contended on behalf of the defendants that the *plaintiff is the author of his own misfortune* and have pleaded 'ex turpi causa non-oritur actio' (an action does not arise from an act which the law forbids) and alternatively, the defendant have pleaded contributory negligence against both the plaintiffs.

[9] However, the defendants have conceeded (bersetuju) that the first defendant was acting in *the course of his employment* with the Government of Malaysia at the material time and the second defendant as the Government

of Malaysia will be vicariously liable *provided* the first defendant is found liable as provided under s 5 and s 6(1) of the Government Proceedings Act 1956. Section 5 states:

> *Liability of the Government in tort*
> 5 Subject to this Act, the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government.

Section 6(1) states:

> *Limits of liability of the Government*
> 6(1) No proceedings shall lie against the Government by virtue of section 5 in respect of any act, neglect or default of any public officer, unless proceedings for damages in respect of such act, neglect or default would have lain against such officer personally.

[10] *The first defendant* had testified that on 9 September 1999 at about 9pm, he was with five other policemen on *patrol duty for crime prevention* and to check the public and motor vehicles at Jalan Pasir Bogak, Pangkor as instructed by C/Insp Tan Gear Boe, the OC in charge of the Pangkor police station. The first defendant had also testified that after the incident he alone was instructed to leave Pangkor. The other five policemen were not asked to leave Pangkor. The first defendant had also said that he was asked to leave Pangkor as hundreds of people had gathered at the police station to show their anger and dissatisfaction against the police and him, and it was the first time that the *public had gathered* at the Pangkor police station. He also admitted that although other *motorist had previously been stopped and summoned for not wearing crash helmet*, there was no such incident where the public gathered at the police station. He was instructed to leave Pangkor *as the people who gathered at the police station had demonstrated* (mass protest) to show their anger and dissatisfaction against the police and him as to what had happened.

[11] The first defendant had also said he did not carry with him the 'traffic stop signs' when he was on patrol duty on crime prevention. He also said that he called the first plaintiff to stop as he was chasing him but *the first plaintiff did not stop*. (Note: However, both the plaintiffs have said they did not hear the first defendant calling them to stop).

[12] Lans Corporal Hussin bin Hashim, one of the five policemen who were on patrol duty at the time with the first defendant was called as the first defendant's witness to support his defence. However, he testified that he only came to the scene after both the plaintiffs and the first defendant were lying on the road. Lans Corporal Hussin bin Hashim was not of any assistance to the first defendant to support his version of how the plaintiff fell from their motorcycle.

[13] The first plaintiff has claimed for general damages (for pain and suffering and loss of amenities), special damages, loss of earnings and expenses incurred by him and his father who was a fisherman and who gave up his job to look after him. The first plaintiff was a fisherman helping in his father's business and sells burger during weekends on a part time basis. He claims he was earning a sum of RM1,300 per month. The first plaintiff has also claimed for cost of domestic help to look after his needs and for cost of wheel chair, cost of urine bag, catheter and diapers.

DECISION

[14] Having seen the demonstration by the parties as to how this unfortunate incident occurred, namely, how the first defendant came abreast close to the first plaintiff's motorcycle with his motorcycle when he kicked the plaintiff's motorcycle as a result of which both the plaintiffs were thrown of their motorcycle, this court accepts the version of both the plaintiffs as described by them that the first defendant had kicked their motorcycle. This court is satisfied that the first defendant was negligent when he kicked the plaintiff's motorcycle as a result, the first plaintiff lost control of his motorcycle and fell. This court finds both the plaintiffs as truthful witnesses. On the other hand, this court rejects the first defendant's version that the plaintiffs fell off the motorcycle because the first plaintiff was speeding and could not control his motorcycle as he was speeding which this court finds it against the weight of the totality of the evidence.

[15] *The first defendant's witness*, namely, C/Insp MD Amirthalingam, the investigating officer, was an honest witness, when he testified and said there was sufficient evidence to frame a criminal charge against the first defendant for causing grievous hurt to the first plaintiff under s 338 of the Penal Code (ie an act so rash or negligent as to endanger life or the personal safety of the first plaintiff). However, C/Insp MD Amirthalingam had testified that there was no evidence to support from any of the witnesses that the first defendant had assaulted or stabbed the first plaintiff after he fell from his motorcycle. In fact the second plaintiff, the pillion rider herself could not support this allegation of assault by the first defendant as she was unconscious after the fall.

[16] The plaintiffs have established on the balance of probabilities that the first defendant kicked the motorcycle they were riding and that it was the act of kicking the motorcycle which caused both the plaintiffs to fall with the motorcycle and which resulted in the injuries suffered by both of them. Accordingly, this court is satisfied that the plaintiffs have established on the balance of probabilities that the first defendant kicked the plaintiffs' motorcycle and that the act of kicking the motorcycle caused the first plaintiff to loose control of his motorcycle where both the plaintiffs fell on the road. As a result, the first plaintiff suffered serious injuries and losses.

[17] A policeman in pursuit does owe a duty of care to the suspects he is pursuing. *The standard of care on such policeman and in such situations 'is to exercise such care and skill as is reasonable in all the circumstances'* (see *Marshall v Osmond & Anor* [1983] 2 All ER 225). The act of the first defendant in kicking the first plaintiff's motorcycle who was riding at a fast speed and even though he was attempting to escape police detention for a traffic offence in the considered view of this court was most unjustified and unlawful. The act of kicking the first plaintiff's motorcycle with the intention of stopping him and even where the first plaintiff was attempting to avoid apprehension surely is not an act condoned by his superiors. This is evident from the decision of the investigating officer who recommended that the first defendant be charged under s 338 of the Penal Code. This court wishes to make it clear that the fact the first defendant was charged in court for an offence under s 338 of the Penal Code was not a factor which this court had applied to determine negligence against him as the evidence produced by the plaintiffs was sufficient to establish negligence against the first defendant. It would be an affront to justice to condone such high handed manner as committed by the first defendant for a mere breach of traffic regulations ie for not wearing crash helmet which has caused the first plaintiff, a minor at the time to be a wheel chair dependant for the rest of his life and suffer loss of amenities, and experience such unbearable discomfort.

[18] On the other hand, in attempting to escape apprehension in this police pursuit, the court is in agreement with the contention of learned senior federal counsel, Mr Amarjit Singh that the first plaintiff took a serious risk to himself and other road users in riding his motorcycle at such fast speed. Therefore, this court finds the first plaintiff had also contributed to the damage he had suffered. Accordingly, the damages have to be reduced as this court finds having regard to the first plaintiff's share in the responsibility for the damage (see s 12(1) of the Civil Law Act 1956).

[19] As for not wearing crash helmet, a reasonable prudent motorist in the position of the first plaintiff's position would have foreseen that the wearing of crash helmet might result is less harm or injury being caused to his head

by a third party in particular, this incident, or if he is involved in a collision while riding a motorcycle. Accordingly, there should be a deduction on the damages to be awarded for his *head injury*. As stated above, this court finds that there is also contributory negligence on the part of the first plaintiff. There was lack of reasonable care by the first plaintiff for his own safety and that by his want of reasonable care he had contributed to the damage suffered.

[20] Be that as it may, *having regard to the totality of the evidence*, this court finds that the first plaintiff has failed to established on the balance of probabilities that the first defendant had assaulted and stabbed him after he had fallen and as he was lying on the road. There was no evidence to support the first plaintiff's allegation of the assault by the first defendant except for the first plaintiff's bare allegation.

DAMAGES

[21] The primary object of an award of damages is to compensate the plaintiff for the harm done or injury caused to him or her. It is well settled in law that the governing purpose of damages is to put the plaintiff whose rights have been violated in the same position as before, so far as money can compensate. However, in addition to the normal compensatory damages, damages which are called *exemplary* or *aggravated damages* or *vindictive damages* may also be awarded whenever, it is found that the defendant's conduct is sufficiently outrageous, willful and unlawful to merit such punishment. Nevertheless, this court is not satisfied with *the first plaintiff's version that he was assaulted, beaten and stabbed* after he fell or that the alleged assault was the *effective cause of his severe injuries*. Therefore, on the set of facts in the instant case, this court is unable to award any aggravated damages.

[22] However, on the set of facts in the instant case, this court finds that the first plaintiff is entitle to exemplary damages in addition to compensatory damages. The act of kicking the first plaintiff's motorcycle to prevent him from escape for a mere breach of traffic regulations is unjustified, unacceptable and unlawful under the circumstances, and it is an unauthorised, willful, wrongful and oppressive act. On the set of facts, there was a high degree of forseeability that the first plaintiff would loose control of his motorcycle and be thrown of his motorcycle by the wrongful act of kicking which in fact happened and turned out to be a disaster. The first plaintiff is now a wheel chair dependant. The award of *exemplary damages* is to mark the court's disapproval towards the unwarranted, willful, oppressive and wrongful conduct of the first defendant and to deter him from repeating it. It is also to show that the first defendant cannot do that sort of act with

impunity and it was out of all proportion to the circumstances of the case (see *Rookes v Barnard* [1964] 1 All ER 367; *Loudon v Ryder* [1953] 1 All ER 741).

[23] Admittedly, the first defendant himself had transgressed the traffic regulations where the motorcycle he was riding at the material time did not have in force a road tax and third party insurance coverage for which admittedly, he was charged in court, convicted and fined by the Magistrate's Court, Sri Manjong. On the set of facts, a sum of RM50,000 would not be unreasonable as exemplary damages. The sum of RM10m claimed by the first plaintiff is exorbitant and out of proportion and ought to be rejected.

[24] As stated above, while there is evidence that the first plaintiff was endeavoring to make his escape and *avoid detention* and he was not wearing a crash helmet and had no license to ride a motorcycle, there is admission that the first defendant himself who was riding the motorcycle had no road tax and insurance coverage to his motorcycle. In other words, the first defendant himself had transgressed the traffic regulations when he admitted riding the motorcycle without road tax and an insurance coverage where he was charged in court, convicted and fined.

VICARIOUS LIABILITY

[25] This court also finds that the act of the first defendant was committed in the course of his employment and that the second defendant is vicariously liable for the negligent act of the first defendant (see ss 5 and 6 of the Government Proceedings Act; *Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor* [2008] 3 MLJ 8; *Maslinda bt Ishak v Mohd Tahir bin Osman & Ors* [2009] 6 MLJ 826; [2009] 6 CLJ 653).

[26] Be that as it may, on the set of facts, in terms of degree of liability, this court finds that the blameworthiness of the first defendant was higher than that of the first plaintiff. Accordingly, liability is apportioned at 75% against the first defendant and 25% contributory on the part of the first plaintiff *for his want of reasonable care for his own safety and would include his failure to wear crash helmet that had contributed to the head injuries* (see *Vijayan a/l Kunju Kunju v Yunos bin Dollah & Anor* [1993] MLJU 12; [1993] 3 CLJ 677, r 4 of the Motor-Cycles (Safety Helmets) Rules 1973). The doctrine of 'ex turpi cause non oritur actio' does not apply to the facts and circumstances of this case to prevent the plaintiffs from claiming damages for the tortuous act of the first defendant. Accordingly, both the plaintiffs are entitled to claim for damages under the law of tort.

[27] There is no award for the third plaintiff as he had admitted that his motorcycle has still not been repaired and there is no documentary evidence to warrant any award even for total loss of value to his motorcycle as there is no evidence to support such a claim.

[28] In any event and based on 100% liability and having considered the cases referred by both parties, the *first plaintiff is awarded damages as follows*:

General damages

I Paraplegia Complete motor and sensory neurological deficits and lower limbs, urinary and bowel control due to fracture dislocation of fifth and sixth thoracic vertebrae. Loss of sexual function. Surgical operations. Surgical scars and pressure sore scars. Kyphus deformity over thoracic spine may progress and result in chronic pain. Fracture of right and left femur. Lung Contusion and abrasions. Wheel-chair existence.	RM300,000
ii Head injury Head injury-left parietal lobe contusion and diffuse cerebral oedema. No evidence of any mental disabilities. Treatment only consisted of antibiotics and intermittent intravenous manitol to reduce the cerebral oedema.	RM15,000
iii Nursing Care (1) Plaintiff was 16 years at the time of injury and was hospitalised for 66 months (5 1/2 years) (9 September 1999–8 March 2005). A sum of RM200 per month for 66 months for the first plaintiff's father (PW3) is not unreasonable. RM200 x 66	RM13,200
(2) Medical evidence (specialist report dated 25 August 2007 by Dr Abd Shukor bin in Hashim (exh P17) states the first plaintiff's life expectancy is 30–40 years ie 46–56 years old. Taking 55 years – 16 years (at time of accident) — deducting 66 months (where he was taken care at the hospital) leaves 342 months RM500 x 342	RM171,000

iv Loss of earnings A reasonable sum would be RM500 per month as proposed by learned SFC (as s 28A(2)(d)(i) of the Civil Law Act 1956). Insufficient evidence to support he was earning RM1,300 per month and considering he was only 15 years old at the time of his injury.	(RM500 a month x 12 months x 16 years) RM96,000
According to the evidence of En Abd Rahman bin Mukri (SP4) the following items were being supplied by the second defendant (government) and will cease if judgment is given in favour of the first plaintiff. Therefore, assessment of the award to be given by this court only starts after the date of judgment. From 1 January 2010, the calculation is as follows:	
v Wheel-chair 7 wheel chairs @ RM1,450 each from Jan 2010 RM1,450 x 7	RM10,150
vi Roho Cushion 7 cushions @ RM1,600 each from Jan 2010 RM1,600 x 7	RM11,200
vii Urine bags 10 pieces of bags in a box — RM20 1 month — 10 pieces 56 years — 26 years = 30 years 30 x 12 x RM20	RM7,200
viii Urinary catheter 10 pieces in a box 1 box — RM30 56 years — 26 years = 30 years 30 x 12 x RM30	RM10,800
ix Disposable diapers 10 diapers @ RM40, 10 pieces a month 3 times per day (morning, evening and night) 480 months x 40 (see specialist report dated 23 March 2000)	RM19,200
x Commode wheel chair (for bathing)	No award. There is no medical evidence to support.
xi Agreed special	RM11,978.09
Damages	
xii Exemplary Damages	RM50,000
xiii Aggravated Damages	No award

Second plaintiff: Based on 100% liability, damages is as follows:

Swollen and tender left cheek and lacerated wound 1cm inside mouth. Tender and swollen lower half of left arm. Tender right thigh and unable to raise right lower limb due to pain.	RM5,000
However, taking into account she was not wearing crash-helmet and her admission that she would not have suffered the injuries if she had worn the crash helmet, there should be deduction of 15% contribution.	RM4,250

Third plaintiff:

Special Damages Repairs to motorcycle	No award as no repairs made and no evidence to support.

The plaintiffs are awarded costs and interests as follows:

Costs of the action to be agreed or taxed INTEREST Interest at 4%pa on general damages from date of service of writ to the date of judgment (29 December 2009). Interest at 8%pa on agreed special damages from date of incident on 9 September 1999 till date of judgment (29 December 2009) and on costs of nursing care from the date of discharge from hospital till date of judgment (29 December 2009). Interest at 8%pa from date of incident on 9 September 1999 till date of judgment on 29 December 2009 for loss of earnings (123 months). Interest at the rate of 8%pa on the total judgment sum from the date of judgment till date of satisfaction (see O 42 r 12 of the Rules of the High Court 1980)

[29] In considering the award of RM300,000 as general damages for the pain and suffering and loss of amenities, this court has taken into account the following factors:

(a) He was hospitalised for the total period of 5 1/2 years.

(b) There is no hope that his paraplegia conditions will improve.

(c) He has undergone various operations and treatment and he had to endure extensive and prolonged misery of agony.

(d) He has no control of bladder or bowels.

(e) There have to be mechanical evacuation of faeces and is done approximately three times a day. There has to be evacuation of urine by catheter.

(f) His brain and intelligence are unimpaired.

(g) He has to be moved frequently to avoid body sores if he is too long in one position.

(h) He suffers a great amount of discomfort.

(i) He has lost almost all the amenities.

(j) He has lost the chances of employment and of the pleasures and excitements that add to the brightness of life.

(k) His life is one of constant discomfort and constant expense (see *Morey v Woodfield* [1963] 3 All ER 533).

(l) He will get complications like pressure sore and urinary tract infections from time to time.

(m) He is not going to recover from the permanent disabilities and they are permanent, life long.

(n) Awards in the past requires adjustment for change in the value of money which has to be reflected in the award. The court must keep pace with the time.

(o) The convential scale for guidance with adjustments for the change in the value of money.

NURSING CARE

[30] In assessing the award for cost of domestic help, this court has considered that not all maids employed will be willing to provide this service required of the first plaintiff. In this case, the first plaintiff's father had given up his job as a fisherman to look after his son, the first plaintiff, as a full time domestic help. He must be compensated fairly and justly for the value of services rendered. It must be the same as if a domestic help has been engaged to look after the needs of the first plaintiff (see *Taylor v Bristol Omnibus Co Ltd & Anor* [1975] 2 All ER 1107 which was followed in *Marappan & Anor v Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99). This court is of the considered view that a sum of RM500 per month is a reasonable amount RM500 x 342 = RM171,000.

[31] However, since there is evidence that the first plaintiff's father ('PW3') had given up his job as a fisherman and had spent time with the first plaintiff in the hospital during the 66 months, it is only reasonable that he should also be compensated when considering the nature of the help that was required of him as a father based on the nature of the injuries and the physical condition

of the first plaintiff and the fact that the first plaintiff was only 16 years old at the time notwithstanding the hospital authorities were there to look after him.

[32] The first plaintiff's counsel had informed the court on 29 August 2006 that the first plaintiff will not be claiming damages for nursing care and loss of earnings of PW3 while he was in hospital. Nevertheless, the first plaintiff's counsel did indicate that he would submit for the court to take into account the incidental loss suffered during the time when awarding damages. However, the sacrifices of the first plaintiff's father in giving up his earnings out of necessity to be with his disabled son, who was a minor at the time should be given due consideration by the court. Notwithstanding the concession and having considered the submission made by learned counsel for the first plaintiff, a sum of RM200 per month for the 66 months would not be an unreasonable amount under the circumstances (RM200 x 66 months = RM13,200).

[33] On 100% liability, the award for the first plaintiff are as follows:

(a)	(i) General damages for pain and suffering and loss of amenities (paraplegia)	RM300,000
	(ii) Damages for head injury	RM15,000
(b)	Agreed special damages	RM11,978.09
(c)	Exemplary damages	RM50,000
(d)	Compensation for the first plaintiff's father while he was in hospital with the first plaintiff for 66 days (nursing care).	RM13,200
(e)	Cost of nursing care (domestic help)	RM171,000
(f)	Loss of earnings	RM96,000
(g)	Cost of wheel chair	RM10,150
(h)	Cost of Roho Cushion	RM11,200
(i)	Cost of urine bag	RM7,200
(j)	Cost of urinary catheter	RM10,800
(k)	Cost of disposal diapers	RM19,200
	TOTAL	RM715,728.09

[34] As for the second plaintiff, a sum of RM5,000 is awarded on full liability as general damages. Having taken into account 15% deduction for not wearing crash helmet which caused the facial injury, general damages is reduced to RM4,250.

[35] All the awards to the first plaintiff is subject to a deduction of 25% for contributory negligence on the total award. As for the second plaintiff, a deduction of 15% is made on the award of RM5,000 for her facial injuries for not wearing crash helmet. Costs and interests is awarded as stated above.

Claims allowed substantially.

Reported by Andrew Christopher Simon